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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1225

JOHN R. GAGNON, Warden,
Petitioner,

-v-

GERALD H. SCARPELLI,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Case Is Not Moot.

A. Respondent's period of probation was tolled and has not been running since the date of violation.

Respondent argues that because a period of seven years since probation was imposed on July 9, 1965, has expired, therefore respondent's probation time is up and the state agency is no longer in a position to hold a hearing.

In the first place, the respondent's major premise is incorrect. Sec. 57.072, Wis. Stats., provides, and provided at the time of respondent's conviction, that,

> "[t]he period of probation or parole ceases running upon the offender's * * * committing a crime or some other violation of the terms of his probation or parole which is sufficient in the opinion of * * * the department to warrant revocation of probation or parole. It remains tolled until the happening of one of the following events: Receipt of the offender at the penal institution to which he has been sentenced or from which he has been paroled; in cases supervised by the department, reinstatement of the offender's parole or probation by order of the department; * * *. The date of the order of reinstatement is the date on which the period of probation or parole again begins to run."

Clearly, respondent has not been on probation during the past seven years, whether or not the order of revocation was a valid one. For a considerable part of that time he was in prison serving his sentence in Wisconsin and thereafter he was on parole during which he served a federal prison term. If it is necessary that he be given a probation revocation hearing by reason of this Court's 1972 decision in *Morrissey v. Brewer*, 92 S.Ct. 2593, 40 U.S.L.W. 5016, it will relate back to the time of the violation which was August 5, 1965.

There is no reason for a claim of bad faith or laches on the part of the state agency. When the probation was revoked without a hearing it was done pursuant to existing law which was constitutional under the holding of this Court in *Escoe v. Zerbst* (1935), 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 156. This proceeding was commenced by a petition for a writ of habeas corpus on December 16, 1968, to which a response was promptly filed on January 3, 1969. It took until September 21, 1970, for the decision of the district

court, from which an appeal was promptly taken on October 9, 1970. The court of appeals decision was not filed until December 28, 1971, and this petition for certiorari was promptly filed on March 25, 1972, and was granted June 26, 1972.

Other cases raising the same issue may have become moot by expiration of sentence, but in this case the sentence is fifteen years which still has many years to run.

It should also be pointed out that up until the decision in *Morrissey v. Brewer, supra,* the question whether due process requires a hearing at all was a serious issue in this case and even now the question of what to do about hearings in cases supervised out-of-state under the Interstate Compact is being submitted by petitioner for clarification by this Court.

B. The state agency is entitled to an opportunity to correct its ex post facto constitutional error if it made one, even if the probationary period were to be considered to have run.

It is elementary that relief on federal habeas corpus is not limited to the outright discharge of the prisoner. 28 U.S.C. §2243 provides in part that the court shall "dispose of the matter as law and justice require." Therefore, the doctrine of comity which, through the rule of exhaustion of state remedies, requires that the state have an opportunity to correct federal constitutional errors *before* action in the federal courts (See *Darr v. Burford* (1950), 339 U.S. 200, 204-205, 70 S.Ct. 587, 94 L.Ed. 761) has also been applied by this Court to require that *after* federal habeas corpus the state courts have an opportunity to correct their

errors through state proceedings. *Jackson v. Denno* (1964), 378 U.S. 368, 396, 84 S.Ct. 1774, 12 L.Ed. 2d 908; *Dowd v. United States ex rel. Cook* (1951), 340 U.S. 206, 209-210, 71 S.Ct. 262, 95 L.Ed. 215.

Apropos of the present case, it will be observed that in *Dowd v. United States ex rel. Cook, supra,* the matter was remanded with instructions to give the state an opportunity to afford the habeas petitioner a late appeal of his conviction, even though the state supreme court had held that time for an appeal of right had expired, and had previously denied a discretionary late appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I the undersigned, a member of the bar of this court, do hereby certify that on January , 1973, I duly mailed three copies of the Reply Brief for Petitioner to counsel for the respondent, addressed as follows:

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